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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 379

THE PENNSYLVANIA RAILROAD COMPANY,

*Petitioner,*

vs.

MARGARET V. CHAMBERLAIN, as Administratrix of the Goods, Chattels and Credits of Charles Frederick Chamberlain, deceased,

*Respondent.*

## PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, WITH SUPPORTING BRIEF.

ROSCOE H. HUPPER,
FREDERIC D. McKENNEY,
MORTON L. FEAREY,
*Counsel for Petitioner.*

THE COURT PRESS, INC.

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*Respondent.*

---

## PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioner, The Pennsylvania Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit (No. 397) entered on June 20, 1932 (R. 268) reversing a judgment of the United States District Court for the Southern District of New York (L47/25) dismissing the complaint herein upon the merits, with costs, after the direction of a verdict in favor of the defendant (R. 251).

This action to recover damages for the death of Chamberlain while in performance of his duties as brakeman in petitioner's service was brought by respondent, Margaret V. Chamberlain, administratrix of the deceased, in the District Court of the United States for the Southern District of New York under the Federal Employers' Liability Act,

1908 [35 Stat. 65, U. S. Code, Title 45, Ch. 2, Secs. 51 *et seq.*] (R. 10-15). It was tried before the Honorable Harry B. Anderson, District Judge, and a jury and upon the evidence submitted by both parties, resulted in a directed verdict for the defendant, petitioner here (R. 251), and judgment in accord therewith (R. 26-27).

From such judgment appeal was taken to the United States Circuit Court of Appeals for the Second Circuit (R. 5-8) which, after hearing, reversed the judgment of the District Court, the Honorable Learned Hand and Chase, Circuit Judges, concurring (R. 262-6) and Swan, Circuit Judge, strongly dissenting (R. 266-8). The opinion of the Circuit Court of Appeals and the dissenting opinion have not yet been officially reported.

Petitioner's motion for directed verdict in the District Court was based upon want of evidence sufficient to establish the cause of action relied on in that

> (a) there was no evidence tending to establish any negligence in the premises on the part of this petitioner;
>
> (b) there was no evidence tending to prove the manner in which nor the source from which deceased received the injuries which resulted in his death;
>
> (c) the testimony of Bainbridge was too indefinite and speculative to support an inference that deceased was killed by reason of defendant's negligence and the certain and direct testimony of eyewitnesses called by defendant clearly precluded such inference (R. 95-6, 251).

The single error assigned by plaintiff in support of her appeal to the Circuit Court of Appeals questioned the propriety of the directed verdict for defendant "at the completion of the entire case" (R. 253-5).

The contention of your petitioner is, in substance, that there is no evidence in the record to show that the de-

ceased's death was caused, as averred in the complaint and in counsel's opening, by the collision of a draft of nine cars with the cars on which deceased was riding; that the testimony of all the witnesses who had knowledge of the facts say that the nine-car draft never collided with deceased's draft and that the Circuit Court of Appeals erred in holding that the case must be submitted to a jury because the witnesses who testified that there was no collision were employees of the petitioner.

## Summary Statement of the Matter Involved.

Upon the question raised by petitioner that the District Court was right in directing a verdict in its favor it is necessary briefly to review the evidence adduced. (*Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458.)

Deceased (hereinafter referred to as Chamberlain) was a car dropper (brakeman) employed in interstate commerce in petitioner's Eastern classification yard at West Morrisville, Pa. (R. 50, 94, 39).

At about 5 p. m. on November 3, 1929, Chamberlain fell from a draft of two gondola cars (R. 49-50, 107) which he was "dropping" from the hump to Track 14 (R. 107) leading off the ladder track east of the hump. [The track layout appears on Plaintiff's Exhibit 1—(scale, 1″ to 40′ (R. 46).] The procedure was to push a train load of cars in an easterly direction at a speed of 2 or 3 miles per hour over the top of the hump (R. 91, 108, 177), (designated T. H. on Exhibit 1 a reproduction of which is annexed hereto). The cars having been previously marked with their destinations are cut off just west of T. H. by a car cutter and the various cars are boarded by car droppers who control the movement of the cut cars by hand brakes as they coast to the eastward from T. H. into the various classification tracks (R. 48-9, 104-5).

At about the time of the accident the following drafts moved eastward over the hump in the order given, attended by the car-droppers named:

(1) 7 cars for track 14 ridden by Jetter and Geddes (Jetter's draft) (R. 118, 125, 179, 191);

(2) 2 cars for track 14 ridden by Chamberlain (Chamberlain's draft) (R. 50, 107);

(3) 4 cars for track 20 ridden by Ashmore (Ashmore's draft) (R. 50, 70-1, 108, 120, 174);

(4) 9 cars for track 14 ridden by Stout at head end, Reeves in the center and Allen at the rear (Stout's draft) (R. 51, 108, 209-10);

(5) 3 cars for track 14 ridden by Roberts (Roberts' draft) (R. 149-50).

Between drafts 1 and 2 and between drafts 4 and 5 there were intervening drafts for tracks not stated in the record (R. 118, 149).

Shortly after his draft was switched on to track 14 Chamberlain's body was found some 6 to 8 car lengths (240 to 320 ft.) east of No. 14 switch at the point marked in ink with a cross in a circle on Exhibit 1 (R. 56-7, 137).

Respondent's theory of the accident was that Chamberlain's fall was due to a violent collision between his draft and Stout's draft of 9 cars (No. 4) which followed him, and the sole negligence claimed is the excessive speed of Stout's draft (R. 37-8). *There was no witness who saw deceased fall or testified to an actual collision between the two drafts.* On the contrary, as the dissenting judge stated (R. 267):

> "All the witnesses who were in a position to see testified that the nine-car cut never did hit Chamberlain's."

Briefly stated, all of petitioner's employees engaged in the operation of the various drafts denied that there was

any contact at all between Stout's draft and Chamberlain's draft (R. 121-2, 139, 166, 169, 184, 195, 211, 228, 233), and their testimony establishes that Chamberlain fell before Stout's draft had even entered track 14 (R. 183-6, 191-4, 206, 211); that Stout's draft controlled by three men at the brakes went down at the usual speed of 8 to 10 m. p. h., and stopped a distance of several car lengths west of Chamberlain's draft (R. 184, 195, 211); that Jetter's draft ran to within four or five car lengths of the east end of track 14, where it was anchored with several brakes; that Chamberlain's draft went down off the hump at such a high rate of speed that both Roberts and Edinger warned him to hold it; that in order to check his draft he left his position at the west end of the hind car and hurried to the east end of the first car to apply the brake there (R. 119, 145); that thereafter Chamberlain's draft continued down No. 14 track until it struck the rear end of Jetter's draft just before the draft came to a stop (R. 181). Jetter and Geddes, seeing that the rider of the draft following them had disappeared, went back to find him, and he was discovered about 15 car lengths west just before Stout's draft reached him as he lay between the tracks (R. 183). Stout saw Chamberlain lying on the ground about 10 feet away and at once checked his 9 car draft, but all the cars ran over Chamberlain's body and when they came to a stop he lay 5 to 8 feet west of the rear end (R. 139, 195, 232-3).

The only testimony that even remotely tends to support the claim that there was a collision between Stout's draft and Chamberlain's is that of Bainbridge, the plaintiff's only witness on the merits, who at about the time of the accident was standing at the point marked "B" on Exhibit 1 (R. 48). He testified that he saw Chamberlain's draft going by him at 8 or 10 miles an hour (R. 50), and then stated that after an intervening draft had passed and had been shunted onto another track he saw Stout's draft go down the hump at a speed of 10 or 12 miles an hour (R. 51); that he

left the point "B" and walked over to the office, a distance of about 20 feet (R. 77) and looked in the window (R. 77), during which time he paid no attention to Stout's draft (R. 78); that he then turned around and saw the front end of Stout's draft going in on 14 (R. 79). He did not see Chamberlain's draft go in on 14, but says that he "saw them in there" (R. 79). He estimated the speed of Chamberlain's draft at that time as "possibly three miles an hour" (R. 52), and claims that at the same time the head end of Stout's draft was 4 or 5 car lengths behind Chamberlain's (R. 75) and running "around 14 or 15 miles an hour" (R. 53), and that Chamberlain was still at the same brake as when he started, namely, on the west end of the second car (R. 50, 53, 70, 80). He testified that he paid no more attention to the cars (R. 54) until he heard someone shout two or three minutes later (R. 54, 80). Upon being directly questioned as to whether he meant two or three minutes rather than seconds, he stated that he did (R. 80, 82). He stated that when he heard the shouting he looked up and saw all the cars going along track 14 together (R. 55). Bainbridge testified that during the interval noted he heard a "loud crash" but that he paid no attention to it, and admitted that the crash of cars coming together was nothing unusual (R. 81). Cars were being run off the hump continuously and making contacts with other cars in various parts of this yard and another yard immediately adjoining to the north was being operated in the same manner (Defendant's Exhibit A, R. 240, 241). The time of the crash was not placed more definitely than at some time within the two or three minutes interval and the direction from which the sound came is not placed at all by the testimony. The so-called "crash" is not stated by the witness to have had any connection with this particular movement or the death of Chamberlain.

The accident occurred at dusk on a misty afternoon (R. 67, 105). Reference to the almanac shows that the

sun set at 4.51 on that day. There can be no doubt that visibility was poor.

The point "B" where Bainbridge claims to have stood and first watched the cars is about 180 ft. east of the top of the hump (R. 98) and from 807 to 887 feet west of the point of the accident, if we assume that the accident occurred where Chamberlain's body was found (R. 56-7, 98-9). Track 14 makes a slight bend to the south just east of the switch and is practically in line to the east from the point "B" and the front of the yard master's office. The nine car draft could not have cleared the switch entirely when its first car ran over Chamberlain and the overhanging ends of the cars as they made the bend to the right necessarily lessened Bainbridge's view of the cars along the north side of the string. The steep portion of grade was west of the point where Bainbridge claims to have stood while the grade to the east was very gradual (R. 102) and it was physically impossible for Bainbridge to see over the tops of the cars when deceased was run over.

Bainbridge not only gave the speeds of the drafts as they passed him at "B" (R. 50-1) but also attempted to estimate the speed of both Chamberlain's and Stout's draft after they had gone in on track 14 (R. 52, 53, 82) a distance of over 800 feet away and with the cars moving directly away from him.

At the close of the whole case petitioner moved for a directed verdict on the ground that there was no proof of negligence on the part of the petitioner and no facts from which an inference of negligence could be drawn, that there was no proof that the coming together of any cars was the proximate cause of the accident and no proof that the deceased was knocked from his car by any impact (R. 251, 96). The District Court granted petitioner's motion without any opinion (R. 251).

On appeal the Circuit Court of Appeals held, by a divided Court, that the direction of a verdict for the peti-

tioner could not stand "without intruding upon the exclusive competence of the jury" and ruled that the jury alone should "choose between a single witness whose story is neither inherently improbable, nor contradicted by evidence which cannot reasonably be disregarded, and a large number who contradict him, at least when they are in the defendant's employ, and in part concerned in the occurrence" and reversed the judgment (R. 266).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. There is not under the Federal rule sufficient evidence in this record to submit this case to a jury on the question whether there was a collision between Chamberlain's two-car draft and the following nine-car draft, resulting from negligent operation of the latter at excessive speed and causing Chamberlain's fatal injuries, and these being material elements of respondent's case, a verdict was properly directed by the District Court and its judgment should not have been reversed by the Circuit Court of Appeals. (*Atch., T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, *Atlantic Coast Line R. Co.* v. *Temple*, 285 U. S. 143.)

2. The testimony on behalf of respondent upon which the Circuit Court of Appeals reversed the judgment of the District Court is so uncertain, indefinite, conjectural, circumstantial and negative that it cannot under the Federal rule raise a question of fact upon the material questions in the case against the positive testimony of petitioner's witnesses, and, therefore, the Circuit Court of Appeals should not have reversed the judgment directed in favor of the petitioner. (*Southern Ry. Co.* v. *Walters*, 284 U. S. 190.)

3. The Circuit Court of Appeals in holding that the credibility of petitioner's witnesses was for the jury in view of the fact that they were in petitioner's employ and

some of them concerned in the operation of the nine-car draft, have decided this question in a way probably untenable and in conflict with the weight of authority and particularly contrary to the decision of this Court in the recent cases of *Atlantic Coast Line* v. *Temple,* 285 U. S. 143 and *Chesapeake & Ohio R. Co.* v. *Martin,* 283 U. S. 209.

4. In holding that under the circumstances set forth the judicial discretion of the Trial Court was improperly exercised in directing a verdict for petitioner, and in declining to recognize the superior opportunity of the Trial Court for reviewing the weight of the evidence the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and by its decision sanctions such departure in the future on the part of trial courts in the Second Circuit as to call for an exercise of this Court's power of supervision. (*Patton* v. *Tex. & P. R. Co.,* 179 U. S. 658.)

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

THE PENNSYLVANIA RAILROAD COMPANY,
By ROSCOE H. HUPPER,
New York, N. Y.

FREDERIC D. McKENNEY,
Washington, D. C.

MORTON L. FEAREY,
New York, N. Y.,
Counsel for Petitioner.

# Supreme Court of the United States

OCTOBER TERM—1932.

No. .

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*Petitioner,*

—against—

MARGARET V. CHAMBERLAIN, as Administratrix of the Goods, Chattels and Credits of Charles Frederick Chamberlain, deceased,

*Respondent.*

## *BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.*

### I.

### The Opinions of the Courts Below.

There was no opinion by the District Judge.

The opinion of the Circuit Court of Appeals (R. 262-6) and the dissenting opinion (R. 266-8) rendered June 13, 1932 are not yet officially reported.

### II.

### Jurisdiction.

(1) The statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, 43 Stats. 938 (U. S. Code, Title 28, Sec. 347a).

(2) The order of the Circuit Court of Appeals, review of which is sought, was entered on June 20, 1932 (R. 268).

Although the order of the Circuit Court of Appeals is not a final judgment, Section 240(a) of the Judicial Code, as amended, clearly confers discretionary jurisdiction upon this Court to bring up a case of this character from the Circuit Court of Appeals by certiorari and subparagraph (b) of paragraph 5 of Rule 38 of this Court clearly recognizes such right. Certiorari was allowed by this Court after a judgment was reversed and a new trial ordered in the Circuit Court of Appeals in *Delk* v. *St. Louis & San Fran. R. R. Co.*, 220 U. S. 580.

## III.

## Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interests of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

## IV.

## Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred in holding:

1. That the judgment of the District Court entered on the directed verdict for defendant should be reversed.

2. That there was sufficient evidence in the record to require the submission of the case to a jury on the question whether there was a collision between Chamberlain's draft and the following nine car draft proximately causing the death of decedent.

3. That the testimony of Bainbridge was not so un-

certain, indefinite, conjectural, circumstantial and negative as to preclude its raising a question of fact against the direct positive testimony of every witness who was in a position to see to the effect that no collision occurred between the drafts.

4. That Bainbridge's testimony was not inherently improbable.

5. That the case must be submitted to a jury because the testimony denying collision was given by petitioner's employees.

6. That the superior opportunity of the Trial Judge for reviewing the weight of the evidence is not to be recognized in reviewing the case on appeal.

7. That the Trial Judge improperly exercised his judicial discretion in directing a verdict for petitioner.

## V.

## Argument.

## POINT I.

**The Trial Court properly directed a verdict in favor of the petitioner because respondent failed to prove any collision between the nine-car draft and that of Chamberlain. Her case was not aided by petitioner's witnesses. On the contrary, all the evidence showed conclusively that the accident happened without fault on the part of the defendant.**

The Circuit Court of Appeals ignored the conjectural and the inherently improbable nature of the unsupported testimony of respondent's single witness, Bainbridge, whose

admittedly casual observations were made at dusk from a point at least 807 feet, and as the Circuit Court of Appeals stated, about 900 feet (R. 263), from the scene of the accident. In so doing and in ruling that it had sufficient weight to merit consideration by a jury against the direct evidence of petitioner's witnesses, who from vantage points immeasurably superior positively disproved the inferences sought to be drawn from Bainbridge's testimony, the Court below departed from the rule laid down by this Court recognizing the right and duty of a trial court to direct a verdict for a defendant in such circumstances.

*Atchison T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458;
*Southern Ry. Co.* v. *Walters*, 284 U. S. 190;
*Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, 660;
*Atlantic Coast Line R. Co.* v. *Davis*, 279 U. S. 34;
*Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7;
*C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478;
*N. Y. C. R. Co.* v. *Ambrose*, 280 U. S. 486;
*Atchison T. & S. F. R. Co.* v. *Toops*, 281 U. S. 351.

The Circuit Court of Appeals expressly recognized that unless Chamberlain was thrown off his cars by a collision of the following nine cars (Stout's draft) defendant was not liable in this case (R. 263).

There was no witness who testified that there was an actual collision between the two drafts and respondent's claim that there was such a collision is based entirely on inferences sought to be drawn from circumstances not clearly proved. Every witness who was in a position to see positively testified that there was no collision and by such direct testimony affirmatively disproved the inference

sought to be drawn from the testimony of Bainbridge, the sole witness for respondent on the merits.

*Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 194.

Bainbridge did not see Chamberlain fall. He did not see Stout's nine-car draft collide with Chamberlain's two-car draft. On the contrary, he merely represented that during periods of inattention, he saw from almost directly in the rear Stout's draft overtaking Chamberlain's draft many hundred feet away on switch track 14, which, as strikingly shown by the surveyor's blueprint of the track layout (Plaintiff's Exh. 1, copy of which is annexed hereto), was on a direct line to the eastward of where Bainbridge stood,—so that his representation was demonstrably improbable, if not impossible. Then a few minutes later he heard a "crash" somewhere in the yard where the impact of drafts coupling up by gravity was commonplace.

Since proof of collision is a vital element of respondent's case and as concededly there is no direct proof to establish any impact, the circumstances from which the alleged collision can be inferred must be clearly proved.

*C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472.

There the Court said (477):

> "As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."

Obviously Bainbridge's testimony can have no probative value unless his opportunities were such that he could correctly determine from his position the relative speeds of the two drafts he claims to have seen, the distance between them at the place of the accident and the number

of cars making up the draft at the time when he saw them "all going down together" (R. 55). The physical facts demonstrate that he had no such opportunity. He was over 800 feet away, the track extended in practically a straight line ahead of him, he could not see over the tops of the cars and such view as he had was diminished by poor visibility. The language of this Court in *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 194, is pertinent:

> "It is argued that it may be inferred from the speed of the train when some of the witnesses observed it crossing other streets as well as Bond Avenue, and from a guess of the engineer as to the time required to get up such speed after a full stop, that none could have been made at Bond Avenue. But the argument amounts to mere speculation in view of the limited scope of the witnesses' observation, the down grade of the railway tracks at the point, and the time element involved. (Compare *Chicago, M. & St. P. R. Co.* v. *Coogan*, 271 U. S. 472.) Five witnesses for defendant testified that a full stop was made and the crossing flagged, and that no one was hit by the rear of the tender, which was the front of the train.
>
> An examination of the record requires the conclusion that the evidence on the issue whether the train was stopped before crossing Bond Avenue was so insubstantial and insufficient that it did not justify a submission of that issue to the jury. *Gulf M. & N. R. Co.* v. *Wells*, 275 U. S. 455; *Kansas C. S. Ry. Co.* v. *Jones*, 276 U. S. 303; *New York Central R. Co.* v. *Ambrose*, 280 U. S. 486; *Gunning* v. *Cooley*, 281 U. S. 90, 93; *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351."

On the evidence above shown the Circuit Court of Appeals would allow a jury freedom to infer that Stout's nine-car draft did in fact collide with Chamberlain's draft and upon such primary inference to build a further inference

that the operation of the nine-car draft was negligent and that Chamberlain was thrown off his draft and injured by the collision. This, in the face of the positive testimony of petitioner's three brakemen on the nine-car draft (Stout, R. 211; Reeves, R. 288; Allen, R. 233), its two brakemen on the draft preceding Chamberlain's draft on track 14 (Jetter, R. 184; Geddes, R. 195), its brakeman on the three-car draft following the nine-car draft (Roberts, R. 151-2), and its switchman (Edinger, R. 137) that no such collision in fact occurred. All of petitioner's witnesses were in a position to definitely establish that fact one way or the other.

Petitioner's contentions are concisely stated in Judge Swan's dissenting opinion as follows:

> "Unless the nine-car cut of cars bumped into Chamberlain's two-car cut and knocked him off, there was no evidence of negligence by the defendant. Bainbridge did not testify that he saw any such collision, he inferred that it occurred because he heard a crash and because thereafter the two strings appeared to him to be moving together. But the crash might have come from elsewhere in the busy yard, and he was in no position to see whether the two strings of cars were actually together. He repeatedly said he was paying no particular attention, and his position was such, being 900 feet from the place where Chamberlain's body was found and less than 50 feet from the side of the track in question, that he necessarily saw the strings of cars at an acute angle when they appeared to be moving together. At such an angle it would be physically impossible even for an attentive observer to tell whether the forward end of the nine-car cut was actually in contact with the rear end of the two-car cut. All the witnesses who were in a position to see testified that the nine-car cut never did hit Chamberlain's. Plaintiff's evidence was wholly

> circumstantial, and the inferences which might otherwise have been drawn from it were shown to be utterly erroneous, unless all the defendant's witnesses were willful perjurers. This is not a case where direct testimony to an essential fact is contradicted by direct testimony of other witnesses, though even there it is conceded a directed verdict might be proper in some circumstances. Here, when all the testimony was in, the circumstantial evidence in support of negligence was thought by the trial judge to be so insubstantial and insufficient that it did not justify submission to the jury. *Cf. Southern Ry. Co.* v. *Walters,* 284 U. S. 190, 194, 52 S. Ct. 58, 76 L. Ed. . His opinion is entitled to 'large respect' by an appellate court 'when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he rules by instructions to that effect.' *Patton* v. *Texas & Pac. Ry. Co.,* 179 U. S. 658, 660, 21 S. Ct. 275, 276, 45 L. Ed. 361."

Under the facts in this case when considered in connection with the well established rule in the federal court relative to the direction of a verdict, it seems inescapable that the direction of a verdict for petitioner by the District Court was proper. Under the federal rule a scintilla of evidence is not sufficient, but there must be reasonable and substantial evidence for the plaintiff before the case can be submitted to the jury and the evidence in favor of the plaintiff must be of such a conclusive and substantial character that if a verdict were rendered for the plaintiff the Court would not have to set it aside in the exercise of sound judicial discretion.

*Pleasants* v. *Fant,* 22 Wall. 116, 122;
*St. L. & S. F. R. Co.* v. *Mills,* 271 U. S. 344;
*Slocum* v. *N. Y. Life Ins. Co.,* 228 U. S. 364, 369;
*Herron* v. *Southern Pac. Co.,* 283 U. S. 91.

A scintilla or modicum of conflicting evidence irrespective of the character and measure of that to which it is opposed does not require the submission of the case to the jury.

*Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254 and cases there cited.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant. *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7.

And the evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury. *Atlantic Coast Line R. Co.* v. *Davis*, 279 U. S. 34.

The legal effect of the evidence is a question of law. *M. & R. V. Ry. Co.* v. *United States*, 270 U. S. 280, 285.

If petitioner is right in its contention that on the evidence in this case it was the right and duty of the District Court to direct a verdict in its favor, the error of the Circuit Court of Appeals in reversing the judgment may only be corrected by the allowance of this writ and if not corrected the decision will have the effect of so limiting the powers of the District Courts in this circuit that petitioner and other railroads engaged in interstate transportation will be forced to submit the question of liability in personal injury cases to the decision of a jury in every case where there is the slightest evidence in favor of the plaintiff. This Court said in *Gunning* v. *Cooley*, 281 U. S. 90, 94:

> "Where the evidence upon an issue is all on one side or so overwhelmingly on one side as to leave no room for doubt as to what the fact is, the Court should give a peremptory instruction to the jury."

Judge Swan, dissenting in the instant case, said (R. 266):

> "I agree that cases are not lightly to be taken from the jury; but, if ever a directed verdict for the defendant in a negligence case is to be sustained this, in my opinion, is such a case."

The importance of preserving the right of a District Court to take a case away from the jury if the evidence under the Federal rule does not warrant its submission cannot be overestimated and is a matter of the gravest public interest to litigants generally in this circuit. As was said by this Court in *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660:

> "At the same time, the judge is primarily responsible for the just outcome of a trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity as jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In *Atchinson, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, this Court said (p. 459):

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

We contend that the principle of these cases has not been applied by the Circuit Court of Appeals in this case.

The trial court admitted evidence of prior contradictory statements by one of petitioner's witnesses—Jetter, but such evidence was entitled to no probative force as evidence of the facts at issue.

> *Sloan* v. *N. Y. C. R. R. Co.*, 45 N. Y. 125, 127;
> *Dixon* v. *Walker*, 206 App. Div. 565, 567-8.

It could not properly be regarded as affecting the credibility of any other of petitioner's witnesses. Jetter's testimony was in no way indispensable. Entirely discarding his testimony, the petitioner's defense that the alleged collision did not occur was established by the overwhelming weight of the evidence.

## POINT II.

**The Circuit Court of Appeals erred in declining to give any weight to the superior opportunity of the Trial Judge of observing the witnesses and passing on the weight of the evidence.**

The Circuit Court of Appeals failed to pay that respect to the ruling of the Trial Court to which it was entitled under the decisions of this Court.

> *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, 660, as quoted *supra*, page 20.

The same rule is followed in the Courts of this State.

> *Bauer* v. *Montague Mailing Machinery Co.*, 163 App. Div. 589;
> *Robinson* v. *Interurban Street Ry. Co.*, 113 App. Div. 46.

In the *Robinson* case the Court said (p. 47):

> "Upon the question of whether the learned trial court erred in setting aside a verdict we must keep in mind the rule which controls an appellate court

in approaching the consideration of that question, and which requires that it should not disturb the disposition made unless it appears that the discretion vested in the trial judge has been exceeded or abused. As said in *Serwer* v. *Serwer* (71 App. Div. 415): 'When a verdict has been set aside by the trial court in the exercise of its discretionary power as against the weight of evidence, its determination ought not to be reversed by an appellate tribunal unless it is made to appear beyond all cavil that great injustice has been done to the defeated party, or unless there has been an abuse of discretion. (*Bannon* v. *McGrane*, 45 N. Y. Super. Ct. 517; *Slater* v. *Drescher*, 72 Hun 425.)' And in *Silverman* v. *Dry Dock, E. B. & B. R. R. Co.* (69 App. Div. 23) it is said: 'While it may be that there was not that preponderance of evidence which would justify an appellate tribunal in setting aside the verdict in the first instance, nevertheless it will not disturb the discretion of the trial court in so doing unless an abuse of that discretion appears'."

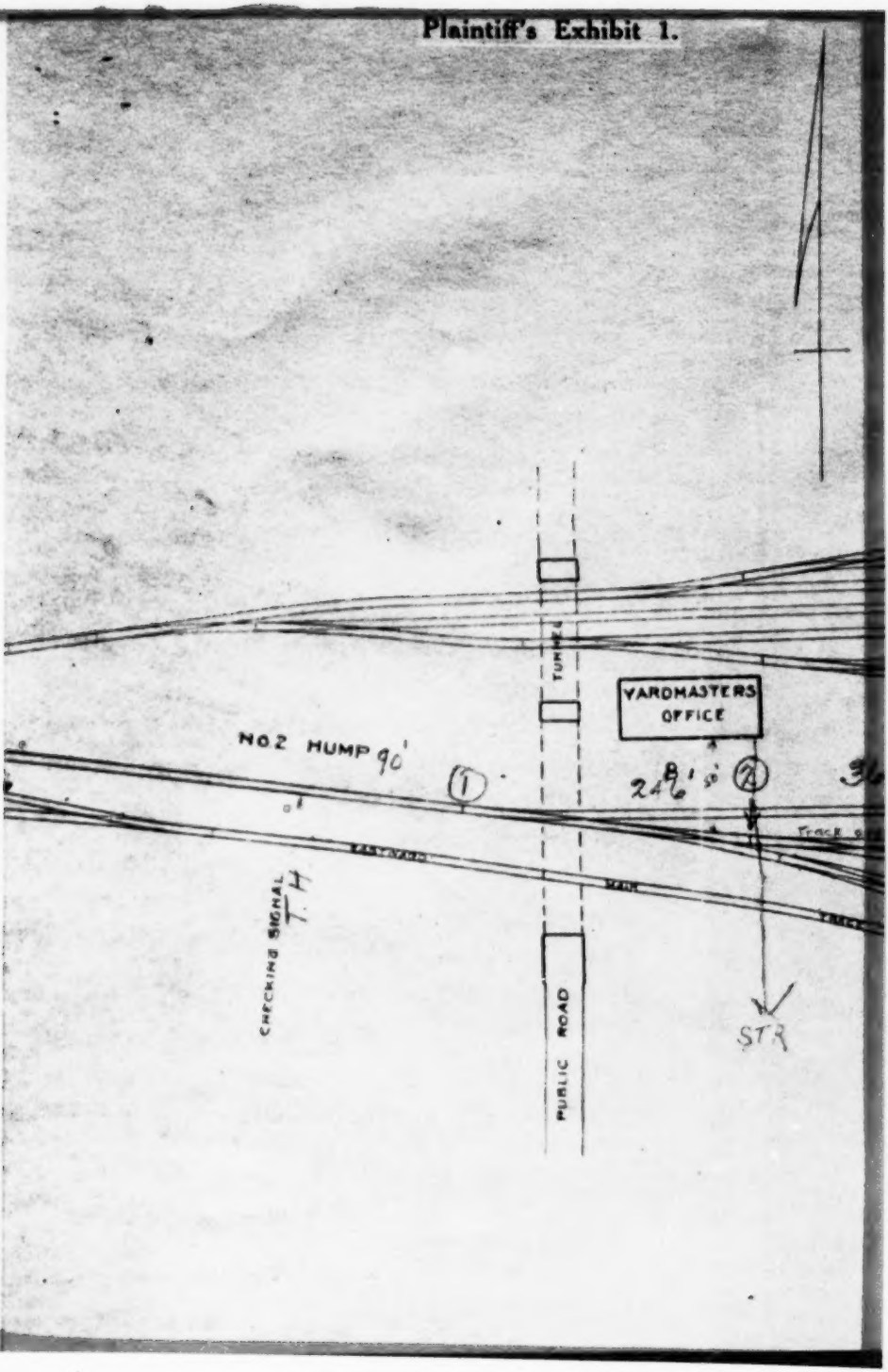
Although there the question was as to the discretion of the trial court in setting aside a verdict, this Court has held that if on the evidence a verdict for the plaintiff would have to be set aside as against the weight of the evidence, it is the duty of the trial court to direct a verdict for the defendant (*Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476).

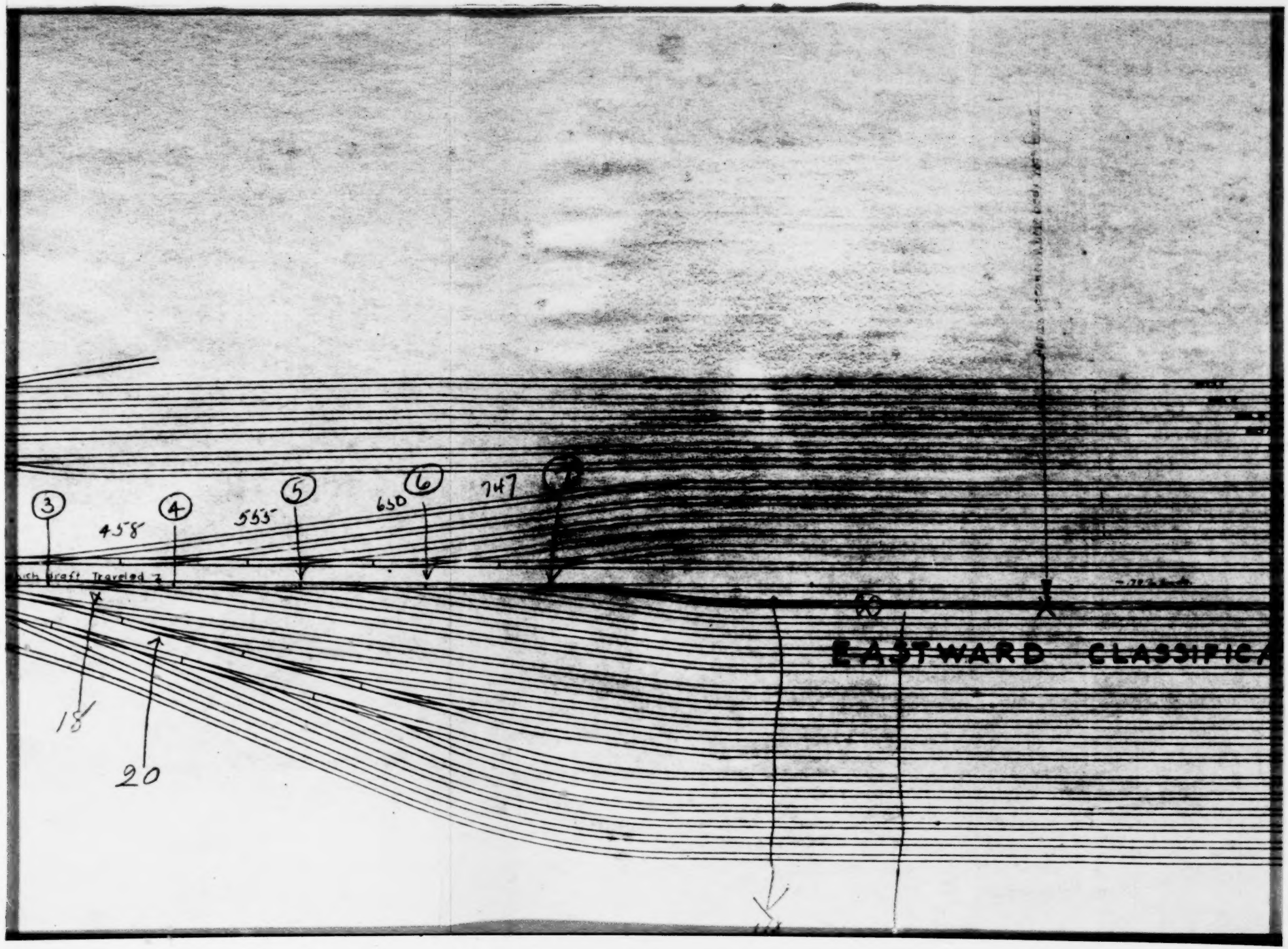
## CONCLUSION.

***For the reasons stated in the petition and this brief it is respectfully submitted that the application for a writ of certiorari should be granted.***

ROSCOE H. HUPPER,
FREDERIC D. McKENNEY,
MORTON L. FEAREY,
*Counsel for Petitioner.*

Plaintiff's Exhibit 1.

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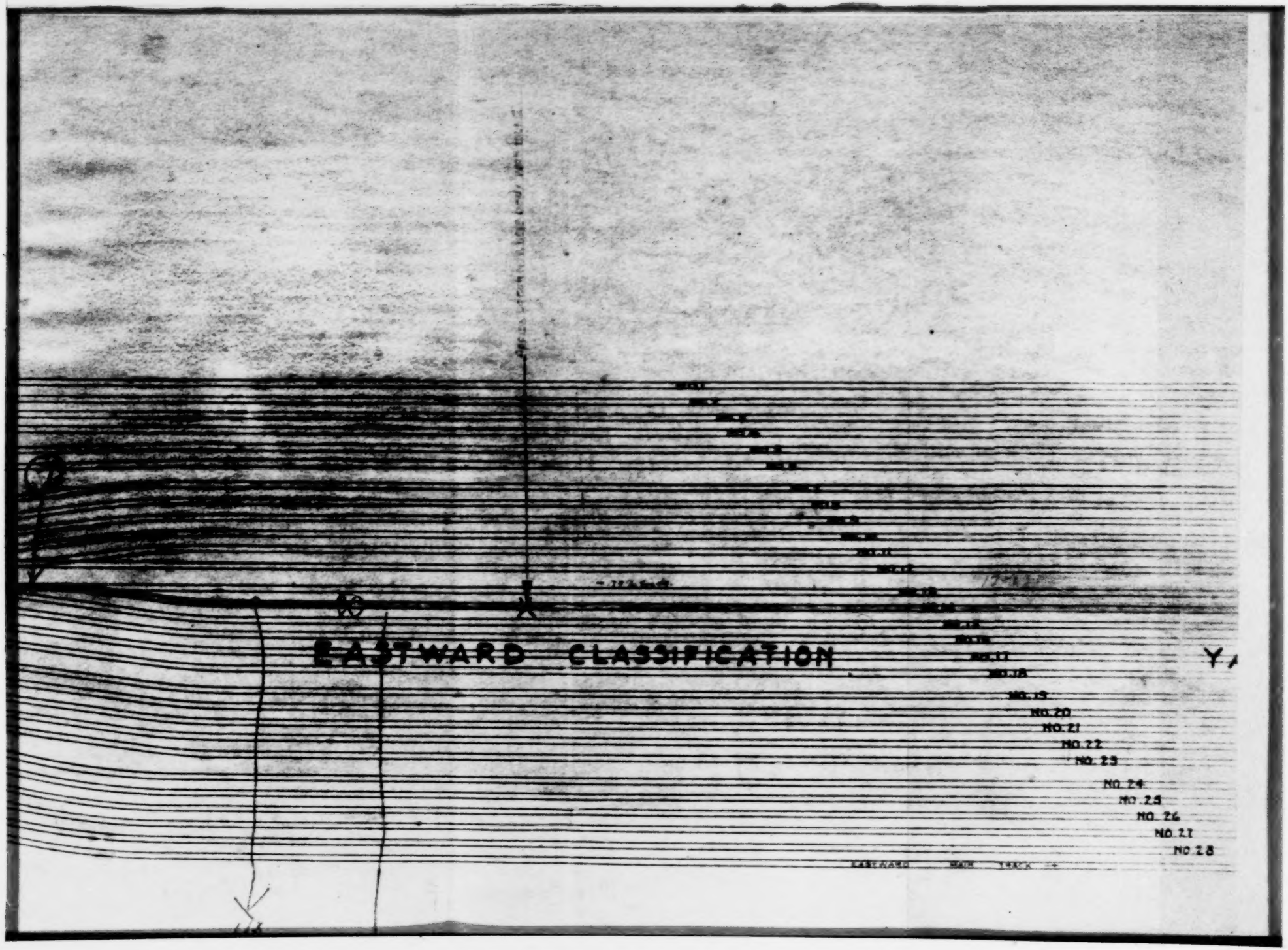
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